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## FISCAL, POLICY, AND LEGAL CONSIDERATIONS REGARDING STATE COMPLIANCE WITH THE ADAM WALSH ACT

### Statement of the Issue

Florida is approaching a crossroad regarding its laws on sex offender registration and notification. Legislators will need to determine whether Florida should substantially implement the federal Sex Offender Registration and Notification Act (SORNA), which is Title I of the Adam Walsh Protection and Safety Act of 2006 (AWA),<sup>1</sup> or not substantially implement SORNA, which would result in Florida incurring a 10 percent reduction in Byrne Justice Assistance Grant (JAG) funding (the penalty Congress has provided for non-compliance with SORNA requirements).

### Discussion

This brief focuses on fiscal, policy, and legal considerations that may be relevant to legislators in determining whether to substantially implement SORNA. To the extent information is available, the potential fiscal impact of substantially implementing SORNA will be compared to the impact of non-compliance. This brief will also focus on three SORNA requirements that Florida has not adopted and that appear most likely to generate discussion and debate: the registration of employment information and public listing of the address of the employer of a registered sex offender; the registration of school information and public listing of the address of a secondary school of a registered juvenile sex offender; and the retroactive application of SORNA requirements.<sup>2</sup>

### Background

The AWA, of which SORNA is a part, is the latest in a long line of federal legislation affecting states' registration/notification laws, and attempts to make all of these states' laws uniform with respect to requirements (or "minimum" standards) that Congress has judged to be necessary to be included in states' laws. It appears that the AWA has generated significant debate and controversy. Illustrative of this controversy, the National Conference of State Legislatures (NCSL) has described the AWA as an "unfunded mandate," a "one-size-fits-all approach to classifying, registering and, in some circumstances, sentencing sex offenders," and legislation that was "crafted without state input or consideration of state practices."<sup>3</sup>

In 2007, the Florida Legislature enacted legislation to revise Florida's laws to comply with SORNA (SB 1604<sup>4</sup> and some provisions of SB 1004, the Cybercrimes Against Children Act of 2007<sup>5</sup>). SB 1604 adopted many, but

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<sup>1</sup> P.L. 109-248 (July 27, 2006)

<sup>2</sup> There may also be considerations other than these fiscal, policy, and legal considerations that may be of importance to legislators in determining whether to comply with SORNA. For example, the AWA bears the name of Adam Walsh, a Florida victim, and, according to its declaration of purpose (SORNA § 102), was intended to respond to "vicious attacks by violent predators" against victims listed in the declaration, which include Florida victims (Jessica Lunsford, Sarah Lunde, Jimmy Ryce, Carlie Brucia, and Amanda Brown). [References to SORNA sections used in this brief are references to sections of P.L. 109-248 (July 27, 2006)].

<sup>3</sup> *2007-2008 Polices for the Jurisdiction of the: Laws and Criminal Justice Committee*. National Conference of State Legislatures (<http://www.ncsl.org/statefed/LAWANDJ.HTM#AdamWalsh>).

<sup>4</sup> Ch. 2007-209, L.O.F. (amending ss. 775.21, 921.0022, 943.0435, 943.0515, 944.606, 944.607, 947.005, 948.001, 985.04, and 985.045, F.S., and creating ss. 943.04354, 943.44353, 985.481, and 985.4815, F.S.).

<sup>5</sup> Ch. 2007-143, L.O.F. (amending ss. 16.56, 775.21, 827.071, 847.0135, 905.34, 910.15, 921.0022, 943.0435, 944.606, and 944.607, F.S., and creating ss. 775.0847 and 943.0437, F.S.).

not all, of the requirements of SORNA, including perhaps the most debated requirement of SORNA: the registration of some juveniles adjudicated delinquent of certain sex offenses. In the 2008 Legislative Session, bills were filed but not passed in both chambers (SB 1698 and HB 1333) to adopt additional requirements of SORNA. HB 1333 contained the latest revisions, and therefore, is discussed in this brief. This legislation will need to be re-written if the Legislature intends to substantially implement SORNA, since it was drafted prior to release of the final SORNA guidelines (“guidelines”) by the U.S. Attorney General.<sup>6</sup>

If legislators decide not to substantially implement SORNA then Florida’s registration/notification laws can be shaped by legislators without the need to consider whether those laws will substantially implement SORNA and ensure full JAG funding. The JAG funding penalty to ensure SORNA compliance is only federal leverage if a state determines that it must have full JAG funding. Legislators would be free to determine which, if any, SORNA requirements to adopt, and could even reconsider and remove SORNA requirements previously adopted, depending on their determination of the state’s best interests.<sup>7</sup> It is uncertain if non-compliance with SORNA could be used as state leverage for Congress to reconsider at least those requirements that have generated the most debate or controversy, but it seems intuitive that Florida’s decision not to comply with SORNA would be of significant concern and importance to Congress and the U.S. Department of Justice’s Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), which administers the SORNA standards. Florida has one of the largest pools of registered sex offenders in the country,<sup>8</sup> so Florida’s non-compliance with SORNA might call into question whether the AWA can, in fact, establish “a comprehensive national system for the registration” of sex offenders (SORNA § 102), one of its declared purposes.<sup>9</sup>

### Fiscal Impact of SORNA Compliance

While states are free to choose not to substantially implement SORNA, non-compliance will result in a 10 percent reduction in Byrne Justice Assistance Grant (JAG) funding. All states are currently under time constraints to comply with SORNA. The implementation deadline is July 27, 2009, but the U.S. Attorney General has the authority to grant up to two 1-year extensions of the implementation deadline. The Florida Department of Law Enforcement (FDLE) has indicated it intends to file for a one-year extension as it is unclear at this time whether the Legislature intends to substantially implement SORNA.

States are beginning to look at whether they can afford to comply with SORNA. However, it is impossible to definitively state what it would cost Florida to comply with SORNA and what Florida stands to lose based on the reduction of 10 percent JAG funding for not complying with SORNA. This is because of uncertainty about future JAG funding, how the JAG funding penalty would be applied, and the availability and duration of grant funding

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<sup>6</sup> *The National Guidelines for Sex Offender Registration and Notification - Final Guidelines*. (July 2008). U.S. Department of Justice ([http://ojp.usdoj.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf)).

<sup>7</sup> If legislators reconsidered SORNA requirements previously adopted, this reconsideration would presumably entail examining the intent in adopting those requirements and what has actually occurred as a consequence of their adoption. For example, as a consequence of the adoption of the requirement that some juveniles adjudicated delinquent of certain sexual offenses register as sexual offenders (a SORNA requirement) pleas may have been accepted to lesser offenses (such as battery) so juveniles do not have to register as sexual offenders, a situation that might not have occurred but for this requirement.

<sup>8</sup> As of August 3, 2008, the date FDLE reported this information, there were 7,227 persons required to register as sexual predators and 42,485 persons required to register as sexual offenders.

<sup>9</sup> Florida has always complied with federal legislation that affects state registration/notification laws. Florida has also been recognized by two non-governmental organizations for its sexual offender notification laws and public sex offender website. Parents for Megan’s Law, a not-for-profit community and victim’s rights organization, gave Florida’s sex offender notification laws its only “A+” grade in its last assessment of states’ sex offender notification laws (2006) (<http://www.parentsformeganslaw.com/html/links.lasso>). TopTenREVIEWS, Inc., a technology review site, ranked FDLE’s sex offender registry website as the best in the country (<http://sex-offender-registry-review.toptenreviews.com/florida-review.html>). These factors may also be of importance to the federal government in regard to what the impact may be if Florida does not comply with SORNA.

for SORNA implementation;<sup>10</sup> difficulties in determining state and local fiscal impact of SORNA compliance; unanswered questions regarding SORNA implementation; and other possible impacts that may result from SORNA compliance.

It has been reported that JAG funding has declined 83.5 percent over the last decade.<sup>11</sup> NCSL staff stated that recent federal legislation that Congress passed (S. 231/H.R. 3546) “continued the existence of the Byrne/JAG program with an authorization (maximum potential funding) of \$1.095 billion, the same authorization from FY 2006. However, the actual FY 2009 appropriations will still be at the discretion of the appropriations committees. While Byrne/JAG could potentially receive \$1.095 billion, it is unlikely the program will actually see those [kinds] of numbers. Since 2003, the largest amount appropriated to Byrne/JAG was \$659 million in 2004. In FY 2006, the actual appropriation of Byrne/JAG was \$416.5 million and \$192 million for Byrne discretionary grants. In FY 2007 the appropriated funding for Byrne/JAG increased to \$520 million, only to be unexpectedly slashed to \$170 million in FY 2008.”<sup>12</sup>

The Bureau of Justice Assistance of the U.S. Department of Justice “awards Byrne Program funds through two types of grant programs: discretionary and formula.”<sup>13</sup> FDLE is the State Administering Agency (SAA), which means that it administers Florida’s Byrne program. The discretionary grant program does not appear to be affected by non-compliance with SORNA, so it is not discussed further in this brief. The total JAG allocation to Florida in FY08 was \$10,054,495, which is a 65 percent decrease (\$12,272,118) from the FY07 JAG allocation. Forty percent of the \$10,054,495 (\$4,021,798) is direct awards to units of local government: \$3,363,673 for direct awards of \$10,000 or more and \$658,125 for direct awards of less than \$10,000 (administered by the state). Sixty percent of the \$10,054,495 (\$6,032,697) consists of the “JAG block award.” A percentage of the JAG block award is “passed through” (subgrants) to local agencies and the remainder funds state agencies (subject to legislative appropriations).<sup>14</sup>

FDLE has attempted to project what Florida might receive based on the FY09 federal appropriations legislation. Based on the House bill, the total funding award to Florida for FY09 may be \$21,670,000. Based on the Senate bill, the total funding award for FY09 may be \$22,852,000.<sup>15</sup> Florida may lose \$2,167,000 (House bill) or \$2,852,000 (Senate bill) in JAG funding based on the application of the 10 percent JAG funding reduction penalty to the projected FY09 JAG allocation to Florida, if information received by FDLE staff from SMART office staff is correct that the 10 percent JAG funding reduction penalty only affects the JAG block award (60% of Florida’s total JAG allocation) and the local direct awards of less than \$10,000 (a portion of the remaining 40% of Florida’s total JAG allocation).

<sup>10</sup> Grants may reduce some of the fiscal impact of SORNA on some state and local agencies. Congress has not funded the Sex Offender Management Assistance program or the bonus payments for prompt compliance with SORNA that were authorized by the AWA, but \$11.8 million in grants and assistance were made available in 2008 through the Adam Walsh Implementation Grant Program. Innovations proposed by states and accepted by the SMART office may also reduce some fiscal impact. For example, FDLE has proposed to the SMART office the concept of using a secure online/by phone self-report rather than having to show up at a sheriff’s office “in person” to register employment and secondary school information.

<sup>11</sup> Gramlich, J. Federal Spending plan slashes anti-crime grants. (December 10, 2007). *Stateline.org* (<http://www.stateline.org/live/details/story?contentId=267844>).

<sup>12</sup> E-mail from Emily Taylor, Policy Associate, NCSL, dated September 9, 2008.

<sup>13</sup> *BJA Program Brief: Edward Byrne Memorial State and Local Law Enforcement Assistance Program*. (August 2002). Bureau of Justice Assistance, U.S. Department of Justice (<http://www.ncjrs.gov/pdffiles1/bja/195907.pdf>).

<sup>14</sup> Information regarding JAG funding allocations to Florida and the fiscal impact on state agencies of legislation implementing SORNA was compiled from various documents and fiscal analyses provided by FDLE, the Department of Corrections, and the Department of Juvenile Justice.

<sup>15</sup> According to FDLE, the \$1.095 billion is the maximum that Congress could appropriate. The Senate bill appropriated \$580 million and the House bill appropriated \$550 million. FDLE estimated the amount of FY09 JAG funds in the Senate bill by taking the amount in the FY09 JAG funds (\$580 million) passed by Senate Appropriation Committee and multiplying it by 3.94% [(\$6,690,822, which is the FY08 JAG block award plus state-administered grants of less than \$10,000 to local governmental entities, divided by the total amount of FY08 JAG funds appropriated by Congress (\$170 million)]. FDLE estimated the amount of FY09 JAG funds in the House bill by taking the amount in the FY09 JAG funds (\$550 million) passed by House Appropriation Committee and multiplying it by 3.94%.

The estimated fiscal impact for FY09-10 on FDLE, the Department of Corrections (DOC), and the Department of Juvenile Justice (DJJ) of implementing SORNA requirements based on prior<sup>16</sup> and proposed<sup>17</sup> implementation legislation would be approximately \$3,226,487.<sup>18</sup> Therefore, if Florida fully implemented SORNA in FY09, the projected impact on these agencies would be greater than the amount Florida would receive from full JAG funding (as projected by FDLE). However, because much of this impact on the agencies consists of non-recurring costs, this impact would appear to decrease in subsequent fiscal years, so JAG funding in subsequent fiscal years might offset or exceed projected implementation costs to those agencies. It is important to note that this number is based on the agencies' estimated fiscal impact, not on what the Legislature might actually appropriate.<sup>19</sup> It is also important to note that the projected fiscal impact does not reflect all of the agencies' projected costs; does not include previous appropriations to implement SB 1604, SB 1004, and requirements of the Jessica Lunsford Act<sup>20</sup> that implemented some SORNA requirements; and relies on some assumptions.<sup>21</sup>

The total fiscal impact of SORNA compliance cannot be measured solely on the basis of projected costs on state agencies, as there is likely to be a fiscal impact on local law enforcement agencies and others<sup>22</sup> in complying with SORNA. However, these impacts cannot be calculated. Only one sheriff's office,<sup>23</sup> the Putnam County Sheriff's office, was willing to speculate what that fiscal impact might be: one new detective position at a cost of approximately \$55,000 to \$60,000.<sup>24</sup> It appears that sheriffs may not be able to categorize actual costs because responsibilities relating to the sex offender registration process may be shared by several people.<sup>25</sup> Further, these people may have other responsibilities in addition to registration responsibilities.

## Policy Considerations

### *Registration of Employment/Volunteer Information and Posting Employers' Addresses on the Internet*

SORNA § 114 requires a sex offender to provide "the name and address of any place where the sex offender is an employee or will be an employee." "SORNA § 111(12) explains that 'employee' includes 'an individual who is self-employed or works for any other entity, whether compensated or not.' As the definitional provisions indicate, the information required under this heading is not limited to information relating to compensated work or a regular occupation, but includes as well name and address information for any place where the registrant works as

<sup>16</sup> SB 1604 and SB 1004.

<sup>17</sup> HB 1333.

<sup>18</sup> FDLE's estimated fiscal impact: SB 1604: \$273,231 (2 FTEs) (FDLE received \$273,231 for the 2 FTEs in FY07-08 and FY08-09); HB 1333: \$951,070 (\$294,470 for 5 FTEs and \$656,600 for programming). DOC's estimated fiscal impact: HB 1333: \$1,288,826 (\$1,128,916 for 16 FTEs and \$159,910 for non-recurring expenses). DJJ's estimated fiscal impact: HB 1333: \$713,360 for costs associated with making changes to the Juvenile Justice Information System.

<sup>19</sup> The agencies' estimated fiscal impact of SORNA implementation legislation was used because the Legislature has not yet appropriated funds for FY09-10.

<sup>20</sup> Ch. 2006-235, L.O.F.

<sup>21</sup> FDLE received \$273,231 (2 FTEs) in FY07-08 for implementation of SB 1604, and \$273,231 in FY08-09 for these FTEs. The \$546,462 in funding is not included in the fiscal impact, nor is the \$110,000 FDLE received for implementation of SB 1004 (\$216,779 less than FDLE's projected costs). DOC estimated there would be \$98,600 for programming costs in FY07-08 to implement SB 1604, but received no funding for these costs and absorbed them. DOC also estimated there would be a workload impact on probation officers but was unable to project the cost of that impact and probation officers absorbed this impact. It is assumed that DOC will continue to absorb these costs. DJJ estimated there would be \$257,598 for 3 FTEs and \$348,200 for non-recurring costs to implement SB 1604. DJJ received \$123,200 for non-recurring costs. It is assumed that DJJ will continue to absorb these costs.

<sup>22</sup> For example, there may be an impact on the court system and county jails. There may be more trials and less pleas in cases in which a defendant's prior sexual offense only becomes a qualifying offense for registration purposes because of a new and nonsexual offense (see description of the SORNA retroactivity requirement, *supra*), and there may be an increase in failure-to-register cases as a result of an increase in the pool of sex offender registrants due to retroactive application of Florida's sex offender registration/notification laws.

<sup>23</sup> Some police agencies will also be impacted by SORNA compliance but inquiries regarding the fiscal impact of SORNA compliance on local law enforcement agencies were limited to Florida's sheriffs due to the difficulty in determining which police agencies might be affected.

<sup>24</sup> E-mail from Major Keith Riddick, Putnam County Sheriff's Office, dated July 31, 2008.

<sup>25</sup> E-mail from Frank Messersmith, Government Consultant, Florida Sheriffs Association, dated August 8, 2008.

a volunteer or otherwise works without remuneration.”<sup>26</sup> Transient employment situations will have to be addressed based on what guidance is provided in the guidelines and the state’s best judgment in accordance with its policies. Florida law does require registration of employment information.<sup>27</sup>

SORNA § 114 also requires the listing of the address, not name, of an employer of a sex offender on a public website. Florida law does not specify what information must be listed on the public sex offender registry website. Section 943.043, F.S., authorizes FDLE to notify the public through the Internet of any information regarding sexual predators and sexual offenders which is not confidential and exempt from public disclosure under s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution. Currently, the address of a sex offender’s employer is not listed on the public website.

The guidelines assert that the listing of an employer’s address rather than name “reflect[s] an accommodation of competing interests. On the one hand, requiring website posting of employer name could tar an employer based on the association with the sex offender and deter employers from hiring sex offenders. On the other hand, disclosing no employment-related information or only limited employment-related information could leave the public unaware concerning sex offenders’ presence in places where they actually spend much of their time (e.g., 40 hours a week for a sex offender with a full-time job).”<sup>28</sup> However, in an age in which businesses can be found based on address searches of electronic phone directories or free Internet search engines, this assertion is questionable. Further, the implied linkage between hours that sex offenders spend at the workplace and public contact is questionable. The employed sex offender may have little or no contact with the public, and presumably is under some form of supervision in most employment situations.<sup>29</sup> In contrast, some sex offenders may have more unsupervised contact with the public for greater periods of time at shopping malls, public parks, beaches and other public venues than at the workplace. This contact may or may not allow for opportunities to reoffend.

Some employers do have concerns about the public listing of employers’ addresses<sup>30</sup> and DJJ has concerns about the registration of volunteer information. This brief notes the responses of six business/trade associations to a legislative request for information regarding their views about this requirement.<sup>31</sup> The Associated Industries of Florida (AIF) stated that the “majority of the companies that responded stated that they do extensive background checks on employees before they are hired and have policies in place so that sex offenders and others with past criminal records cannot be offered employment.” However, these respondents did not think that publicly listing an employer’s name and address was a good idea.<sup>32</sup> It is unclear how they viewed the listing of an employer’s address without the listing of an employer’s name.

The Florida Restaurant and Lodging Association (FRLA) had concerns about the potential burden of the employer address requirement on the restaurant and lodging industry. Many of its members cannot afford to conduct background checks and the only other means of determining if a job applicant or employee is a registered sex offender (unless self-reported) is to check all applicants and employees on FDLE’s sex offender registry website. If an employer’s address information is reported, there may be public backlash against the employer and

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<sup>26</sup> Guidelines, p. 30.

<sup>27</sup> s. 775.21(6)(a)1. and (8)(a)1. and 2., F.S., s. 943.0435(2)(b) and (14)(c)1. and 2., F.S., and s. 944.607(4)(a) and (b) and (13)(c)1. and 2., F.S.

<sup>28</sup> Guidelines, p. 88.

<sup>29</sup> This may address concerns (not discussed in the guidelines) about any perceived threat employed sex offenders pose to fellow employees.

<sup>30</sup> FDLE has proposed to the SMART office the concept of making the address of the sex offender’s school or employer accessible through a specific location search for that type of information on FDLE’s sex offender registry website similar to the current email/instant message moniker search capability. In contrast to including the address of the sex offender’s employer or school on a posted Internet flyer which would make it always readily accessible, the school or employer address would only be accessible if found within the location searched. Whether this is a concept that SMART would deem in compliance with SORNA has not been determined. Even if accepted and adopted, it is unknown if this concept would alleviate concerns of some employers about the address listing requirement.

<sup>31</sup> Seven business/trade associations responded to the legislative request for information. However, the response of the Florida Retail Federation -a survey of some retailers- is not reported in this brief because some survey questions were invalid due to a misconception that employers were required to report their addresses.

<sup>32</sup> E-mail from Keyna Cory, registered lobbyist for the AIF, dated September 1, 2009.

disruption of the employer's business. Members are already dealing with challenging economic conditions, and the restaurant industry has a high employee turnover rate. Further, many of these employees do not work in positions or areas in which they come into contact with the public or with children.<sup>33</sup>

The Associated Builders and Contractors of Florida, Inc. (ABC), the Florida Association of Electrical Contractors (FAEC), the Florida Wall and Ceiling Contractors Association (FWCCA), and the Florida Surety Association (FSA) urged the state to "maintain its current exemption from disclosure of employers and the employer's names and business addresses." These associations stated that they "believe that Florida's exemption is sound and should be continued. The purpose of posting sexual offenders information online is to alert neighbors that a former sexual predator is living in the neighborhood." They also stated that "[s]tate law does not require employers to perform criminal background checks on its employees unless the [employee] will work on school grounds when children are present. Current requirements under the Jessica Lunsford Act address those requirements. If the convicted sexual predator has served his sentence and is attempting to re-enter society with gainful employment, a disclosure of his employer's name and address will have a chilling effect on the hiring of such individuals."<sup>34</sup>

DJJ stated that the reporting of addresses where volunteer work is performed "will have a serious impact on juvenile sex offenders who are court ordered to complete community service work hours. Each circuit develops agreements with various local organizations, which allow juveniles to complete required community service hours under supervision at the program and provide documentation back to the Juvenile Probation Officer. Youth are provided a list of authorized work sites to select from. The community services hours are done a few hours at a time, usually after school." DJJ "currently only capture[s] in JJIS [Juvenile Justice Information System] the completion of the required hours, and anticipate[s] that the reporting of the addresses of these work sites will impact the number of sites which will be available to youth and the work load of JPOs [juvenile probation officers] attempting to capture this information in advance, since the hours are usually done in one or two hour increments." DJJ does not "believe that attempting to capture such extraneous volunteer hours (as opposed to ongoing regular volunteer information) will significantly impact public safety."<sup>35</sup>

### ***Registration of School Information and Posting School Addresses on the Internet***

SORNA § 114 requires a sex offender to provide "the name and address of any place where the sex offender is a student or will be a student." The sex offender must report when he or she commences school attendance and changes schools or the place of school attendance. The guidelines state that this requirement applies only to schools the sex offender physically attends, not, e.g., correspondence schools or virtual schools. Secondary schools and private schools are included. The guidelines do not mention any interest or concern that necessitated this requirement. It is presumed that this requirement was necessitated by a concern similar to that noted in the guidelines for requiring the public listing of employers' addresses, i.e., not publically listing school addresses could leave students and their parents unaware concerning sex offenders' presence in schools where they would be spending a significant amount of time. Currently, Florida law only requires a sexual predator or sexual offender to report enrollment at an institution of higher education, including name and address of this institution.<sup>36</sup>

Since the sex offender, rather than school records, is the source of school address information, the school address listing requirement does not appear to conflict with the federal Family Educational Rights and Privacy Act.<sup>37</sup> However, other concerns have been expressed about the public listing of secondary school addresses.<sup>38</sup> The Florida Association of School Administrators (FASA) stated that it "is concerned when any individual student's school information is posted online. While we understand the good intent of this law, it seems that section 118 of

<sup>33</sup> Notes from August 12, 2008 telephone conversation with Richard Turner, registered lobbyist for the FRLA.

<sup>34</sup> E-mail from Rick Watson, registered lobbyist for the ABC, FAEC, FWCCA, and FSA, dated August 28, 2009.

<sup>35</sup> *2008 Legislative Session Bill Analysis* (HB 1333). (March 28, 2008). Department of Juvenile Justice.

<sup>36</sup> s. 775.21(6)(a)1.b. and (8)(a)2., F.S., s. 943.0435(2)(b)2. and (14)(c)1., F.S., and s. 944.607(4)(b) and (13)(c)2., F.S.

<sup>37</sup> 20 U.S.C. § 1232g; 34 CFR Part 99.

<sup>38</sup> The Florida Department of Education stated that it is "concerned" about this requirement but is "committed to establishing communication with school districts and working with FDLE to comply with the provisions of the Adam Walsh Act by 2009 as required." Attached comments to an e-mail from Tanya Cooper, Deputy Director of Governmental Relations, Florida Department of Education, dated August 27, 2008.

SORNA (42 U.S.C. 16918) may create a situation ... [in which] these juveniles could be put at risk.”<sup>39</sup> Further, staff of the Florida Association of District School Superintendents (FADSS) noted two practical concerns or problems regarding the listing of secondary school addresses. First, “if a parent comes to school with the information, the school is not at liberty to discuss student information. So, school officials are put in a difficult situation with a parent demanding information that a school official may not be able to provide, nor should provide.” Second, there does not appear to be a “statutory basis for the exclusion of a juvenile sex offender ... [who] has paid his or her debt to society from the student’s zoned school. Moreover, such information could be a threat to the safety of the student and other students and a threat to the orderly administration of the school. Parents learning of the presence of a juvenile sex offender at a school where their child was assigned to attend or was attending would no doubt assume they had the right to have the offender transferred or to have their child transferred, neither of which is true. This puts school officials in a difficult, if not impossible situation.”<sup>40</sup>

### ***Retroactive Application of Registration and Notification Requirements***

SORNA’s requirements must be retroactively applied. Retroactive application appears to include persons required to register as sex offenders under SORNA based on an adjudication of delinquency for certain sexual offenses.<sup>41</sup> The guidelines state that “SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions’ incorporation of the SORNA requirements into their programs. Jurisdictions are specifically required to register such sex offenders if they remain in the system as prisoners, supervisees, or registrants, or if they later reenter the system because of conviction for some other crime (whether or not the new crime is a sex offense).”<sup>42</sup> The reasons advanced for this requirement are that “the effects of SORNA’s registration and notification requirements on sex offenders are much the same regardless of whether their sex offense convictions occurred before or after SORNA’s enactment or its implementation in a particular jurisdiction. Likewise, the public safety concerns presented by sex offenders are much the same, regardless of when they were convicted. The SORNA standards reflect a legislative judgment that SORNA’s registration and notification requirements, even if disagreeable from the standpoint of sex offenders who are subject to them, are justified by the resulting benefits in promoting public safety.”<sup>43</sup>

Florida’s registration/notification laws limit how far the state may reach back to require registration. Sexual predators must have been convicted of a current, qualifying sexual offense that was committed on or after October 1, 1993, and sexual offenders must have been released from the sanction for a conviction for a qualifying sexual offense on or after October 1, 1997.<sup>44</sup> However, for juveniles required to register as sexual offenders based on an adjudication of delinquency for certain sexual offenses, the adjudication must occur on or after July 1, 2007.<sup>45</sup> Although the Legislature does not indicate why these dates were chosen, it appears that the 1993 and 1997 dates were based on the effective dates of implementing legislation and may have been chosen because of concerns at the time about legal challenges based on reaching back farther than those dates. The 2007 date was based on the effective date of legislation and appears to have been chosen because court findings required regarding some lewd offenses would not be available before the Legislature required those findings. Whatever the reason for the dates, there are several reasons that could be advanced for their continuing existence, including budgetary concerns, concerns about the availability and reliability of older criminal records, implementation concerns,<sup>46</sup> and the possibility that sex offenders with older sex convictions who have not committed a new sex

<sup>39</sup> E-mail from Jim Warford, CEO of FASA, dated August 7, 2008.

<sup>40</sup> E-mail from Joy Frank, General Counsel for FADSS, dated August 19, 2008.

<sup>41</sup> The retroactivity requirement applies to “convictions” and delinquency adjudications for which registration is required under SORNA are included in the SORNA definition of “convictions.” Guidelines, pp. 16 and 73.

<sup>42</sup> “[T]he guidelines do not require a jurisdiction to register in conformity with SORNA sex offenders who have fully left the system and merged into the general population at the time the jurisdiction implements SORNA, if they do not reoffend.” A state may also “credit a sex offender with a pre-SORNA conviction with the time elapsed from his release (or the time elapsed from sentencing, in case of a nonincarcerative sentence) in determining what, if any, remaining registration time is required.” Guidelines, p. 7.

<sup>43</sup> Guidelines, p. 73.

<sup>44</sup> s. 775.21(4)(a), F.S., s. 943.0435(1)(a)1.a.(II), F.S., and s. 944.607(1)(a)1., F.S.

<sup>45</sup> s. 943.0435(1)(d), F.S.

<sup>46</sup> For example, HB 1333, as amended, did not include a process to identify which offenders would qualify for retroactive application of registration and notification requirements and did not indicate who would be responsible for making this

offense over a significant period of time might not pose the “high risk” that the Legislature concluded sex offenders “often” pose.<sup>47</sup>

The guidelines dismiss the argument that “retroactive application of SORNA’s requirements would be ... unfair to sex offenders who could not have anticipated the resulting applicability of SORNA’s requirements at the time of their entry of a guilty plea to the predicate sex offense.” The guidelines assert that “fairness does not require that an offender, at the time he acknowledges his commission of the crime and pleads guilty, be able to anticipate all future regulatory measures that may be adopted in relation to persons like him for public safety purposes.”<sup>48</sup> This is a legal argument, which does not preclude discussion of fairness as a policy consideration.

## Legal Considerations

In *Smith v. Doe*, the United States Supreme Court rejected an ex post facto challenge to retroactive application of Alaska’s registration and notification requirements.<sup>49</sup> In *Connecticut Department of Public Safety v. Doe*,<sup>50</sup> the Court rejected a due process challenge to Connecticut’s registration and notification requirements. In *Milks v. State*,<sup>51</sup> the Florida Supreme Court cited *Connecticut Department of Public Safety* as support for its conclusion that the Florida Sexual Predator Act (s. 775.21, F.S.) did not violate state and federal procedural due process. The Florida Supreme Court has not addressed challenges to the sex offender registration/notification laws under state and federal constitutional provisions that do not involve due process. However, district courts of appeal have rejected some of these challenges and their decisions appear to be controlling law at this time.<sup>52</sup>

A district court of appeal’s decision that the registration/notification laws, provisions of those laws, or application of those laws is unconstitutional, could create confusion about SORNA compliance. If the “highest court” of a state holds that a SORNA requirement conflicts with the state’s constitution, the U.S. Attorney General may determine the state to be in compliance if the problem cannot be overcome and the state has implemented, or is in the process of implementing, reasonable alternative measures that are consistent with the purposes of SORNA. The Florida Supreme Court is the highest court of this state, but a district court of appeal’s decision may be controlling law throughout the state. State and local officials cannot ignore this decision. Further, this SORNA exception does not address a situation in which a state court rules that a SORNA requirement violates the U.S. Constitution.

identification.

<sup>47</sup> See s. 943.0435(12), F.S. (legislative findings).

<sup>48</sup> Guidelines, p. 74 (both quotations are from this source).

<sup>49</sup> *Smith* is not necessarily dispositive regarding a state ex post facto challenge to Florida’s registration/notification laws. As the Florida Supreme Court has previously noted, “[i]n any given state, the federal Constitution ... represents the floor for basic freedoms; the state constitution, the ceiling.” *Traylor v. State*, 596 So.2d 957, 962 (Fla.1992). Recently, the Alaska Supreme Court held that retroactive application of Alaska’s registration and notification requirements violated that state’s prohibition against ex post facto laws. *Doe v. State*, 189 P.3d 999 (Alaska July 25, 2008).

<sup>50</sup> 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003).

<sup>51</sup> 894 So.2d 924 (Fla.2005). The Florida Supreme Court has also held that the designation of “sexual predator,” as applied to a person based on a kidnapping offense that did not have a sexual component, violated substantive due process. *State v. Robinson*, 873 So.2d 1205 (Fla.2004).

<sup>52</sup> See, e.g., *Givens v. State*, 851 So.2d 813 (Fla. 2d DCA 2003), *rev. den.*, 917 So.2d 193 (Fla.2005) (ex post facto), *Thomas v. State*, 716 So.2d 789 (Fla. 4th DCA 1998) (double jeopardy), *Butler v. State*, 923 So.2d 566 (Fla. 4th DCA 2006) (substantive due process), and *Moore v. State*, 880 So.2d 826 (Fla. 1st DCA 2004) (equal protection).